

## CHAPTER 8

### PUBLIC FACILITIES CONSTRUCTION MANAGEMENT

#### OVERVIEW

The intent of the process described in this chapter is to provide information about the key steps in managing a public facilities project and to inform grant recipients and contractors of their responsibilities when accepting a contract funded in whole or in part by TSEP dollars. The procedures described in this chapter are designed to:

- provide for fair and competitive awards of all contracts and subcontracts for construction of public facilities projects,
- assure the selection of qualified, experienced contractors at a reasonable cost,
- ensure that contractors and subcontractors comply with the applicable state requirements such as labor standards, and
- ensure that the construction phase of TSEP funded public facility projects is managed effectively.

#### A. APPLICABLE STATE REQUIREMENTS

The following state requirements set forth the principles for selection and awarding of construction contracts. In addition to compliance with the following, TSEP grant recipients must comply with applicable requirements discussed in all of the preceding chapters of this manual.

- Bid Security Sections 18-1-201, et seq., MCA, require that all bids be accompanied by bid security in the amount of ten percent to protect the public authority in the event a successful bidder fails or refuses to enter into a contract.
- Contractor Fee and Tax Sections 15-50-101 and 15-50-205, MCA, requires contractors to pay to the Department of Revenue a 1% gross receipts tax and, in addition, requires local governments to withhold 1% of all payments due to contractors and transmit these funds to the Department of Revenue. Person(s) working on contracts valued at less than \$5,000 are exempt from this provision.

- Municipal Contracts and Franchises Section 7-5-4302, MCA, requires competitive bidding by cities and towns of construction contracts in excess of \$50,000, advertising or posting of such contracts before bids are opened, and award of contracts to the lowest responsible bidder.
- County Contracts Section 7-5-2301, MCA, requires that a contract for construction in excess of \$50,000 may not be entered into by a county governing body without first publishing a notice calling for bids.
- Performance, Labor and Material Bonds Section 18-2-201, MCA, requires contractors to provide a bond that ensures that the contractor will "(a) faithfully perform all of the provisions of such contract; (b) pay all laborers, mechanics, subcontractors, and material men; and (c) pay all persons who shall supply ... provisions, material, or supplies for the carrying on of such work." This provision may be waived if the contract is under \$50,000.
- Retainage Section 18-2-316, MCA, limits the maximum retainage applied to construction contracts may not exceed 5% if the contractor is performing by the terms of the contract.
- Final Acceptance and Payment Section 18-2-306, MCA, requires that a government entity that enters into a contract for the construction of a building shall, unless otherwise provided by law or the contract and within 10 days after a request by the construction contractor for final acceptance, decide whether or not to make final acceptance. Within 30 days after final acceptance by the government entity, the government entity shall make the final payment of the contract price specified in the contract to the other party to the contract.

## **B. KEY STEPS IN MANAGING A PUBLIC FACILITIES PROJECT**

The following steps are provided as a brief guide to managing the construction of public facilities projects. They should be followed along with applicable requirements in preceding chapters. You should always consult the actual text of current Montana law and work closely with your engineer regarding required or recommended construction management procedures for public works projects.

### **Step 1 - Select Engineering Services**

An engineer, licensed in the State of Montana, is required to be involved in each TSEP project, including bridge and culvert projects, in order to prepare the final project design, provide construction inspection, and certify that the project has been built to specifications. You should follow the instructions in Chapter 3, Procurement Standards, for selecting an

engineer, in order to ensure compliance with Section 18-8-201, MCA, which provides for the hiring of architects, engineers, and surveyors in response to requests for proposals. Compensation for these professional services is negotiated after the firm is selected through a competitive proposal process.

For various reasons, local governments sometimes prefer to hire their own project inspector instead of using the project inspector normally provided by the project engineer. There are many potential issues and inherent problems if a local government hires its own inspector, such as: qualifications of the inspector, coordination with the engineer, supervision, accountability, liability, the engineer's certification of the project, conflict of interest, etc. As a result, TSEP does not recommend that local governments use this type of arrangement, and TSEP funds cannot be used to reimburse the local government for those expenses. The local government can use its own funds or funding from another source if allowed by the funding agency.

## **Step 2 - Prepare Bid Package**

Before inviting bids on any contract, the following steps should be taken to ensure that the bid package contains all the relevant information that bidders will need for their bid:

- the engineer should provide the local officials with a set of plans and specifications for the construction project including an accurate and clear description of the technical requirements of the project. Additionally, the plans and specifications must be stamped by an engineer registered or licensed by the Board of Professional Engineers & Land Surveyors;
- the plans and specifications must also be reviewed and approved by the Department of Environmental Quality for water and wastewater system projects, or any other appropriate agency;
- acquire any property, easements, or rights-of-way that might be required for construction of the public facility;
- apply for environmental or building permits, or include provisions in the bid documents to ensure that necessary permits are secured;
- obtain information from utilities regarding underground installations. Utility locations should be identified on a map of the project site that will be included in the bid package. The contractor will be required to verify these locations prior to actual construction;
- determine the cost and pricing format. Contracts may be either lump sum or unit priced. "Cost plus" contracts are not allowed; and

- the engineer will prepare the bid package including at least the following items:
  - advertisement for bids;
  - information on the method of bidding, process by which the bids will be evaluated, and the method of contract award;
  - bid schedule;
  - bid bond requirements;
  - information on performance and payment bond requirements;
  - current copy of state or federal prevailing wages, as applicable;
  - general conditions; and
  - TSEP supplemental general conditions (See Exhibit 8-A) or the Funding Agency Special Provisions (see discussion in box).

The major State and Federal funding programs that utilize the Uniform Application have created the Funding Agency Special Provisions for Montana Public Facility Projects that combines each of the funding program's individual supplemental general conditions into a single document. This document may be used instead of the TSEP supplemental general conditions, as long as the Montana Public Works Standard Specifications and Standard General Conditions of the Construction Contract, Funding Agency Edition (EJCDC C-710) are also used. The Funding Agency Special Provisions can be found at the W2ASACT website, listed under the Uniform Specification Supplement, at: <http://dnrc.mt.gov/cardd/ResDevBureau/wasact/default.asp>

The Montana Contractors Association publishes model bid specifications entitled "Montana Public Works Standard Specifications", and includes most of the items listed above. The standard specifications can be ordered from the Montana Contractors Association, 1717 11th Avenue, Helena, Montana, 59601, telephone (406) 442-4162.

All construction contracts must contain provisions for compliance with either federal or state prevailing wage requirements. (See Chapter 6, Labor Requirements.) All bid specifications and contracts for public works projects must include the prevailing wage rates, including fringe benefits that the contractors and subcontractors must pay for each job classification during construction of the project. **Montana law provides that if a public agency or local**

**government fails to include the prevailing wage rate requirements in a bid specification or contract, the contractor is relieved from the obligation to pay the prevailing wage rate and the obligation is then placed on the public contracting agency.**

Bidders must also comply with applicable state and federal civil rights and equal employment opportunity requirements as described in Chapter 5, Civil Rights. The prescribed civil rights clause for bid documents and contracts is also included in the TSEP Supplemental General Conditions found in Exhibit 8-A or in the Funding Agency Special Provisions..

If the TSEP grant recipient is constructing more than one project at the same time (for example, the City has received a TSEP grant to help fund a water project and the City also intends to pay the total cost of an unrelated sewer project) using the same contractor, the TSEP grant recipient needs to be aware of some requirements. Either the projects need to be bid separately or a provision in the bid, for the combined projects, must be included to ensure that the contractor files separate claims for the two projects. TSEP requires that the pay estimate and related documentation submitted with the TSEP Request for Funds Form must be separate from the other project so that the claim is clearly distinct for the project funded by TSEP funds.

### **Step 3 - Obtain Bid Document Review and Approval**

Once the complete bid package has been assembled, it should be reviewed by the TSEP grant recipient's attorney for completeness and consistency with state laws and regulations. Montana law (Section 18-2-404, MCA) requires that all public works contracts be approved in writing by the public entity's legal adviser prior to execution.

The bid package must be reviewed and approved by all other applicable state or federal agencies with review and approval authority for the type of project planned prior to the bid package being advertised. However, the TSEP staff may grant an exception to this requirement if it appears that approval is imminent and the project is not complex. For most TSEP funded projects, this means that the Department of Environmental Quality has reviewed and approved the plans and specifications before the bid is advertised. Bridge projects that touch the federal-aid right of way should be submitted to the Montana Department of Transportation for their review.

To ensure that all of the required TSEP provisions are included, project engineers must send a copy of the bid package, to the assigned TSEP liaison no later than 30 days prior to the initial bid advertisement, for MDOC review. The plans submitted should be as close to 100% final as possible.

#### **Step 4 - Advertise Bid Solicitation**

An advertisement of the bid should be drafted based on the information included in the "Advertisement for Bid" portion of the bid document. The advertisement must be in accordance with the requirements stated in the table on the next page.

<b>Jurisdiction</b>	<b>Statute</b>	<b>Amount of Contract</b>	<b>Advertising Requirements</b>	<b>Notes</b>
Municipalities	7-5-4302, and 7-1-4127, MCA	Contracts over \$50,000	Must advertise twice, no less than six days apart.	The second publication must be not less than five days or more than 12 days before the bid opening.
Counties and Districts	7-1-2121, MCA	Contracts over \$50,000	Must advertise twice, no less than six days apart.	

**A copy of the current state wage rate determinations as provided by the Montana Department of Labor and Industry (MDLI) must be included in any solicitation for bids unless Montana's prevailing wage requirements are superseded by the federal Davis-Bacon Act.** Wage rate determinations are periodically issued by the MDLI for "Heavy", "Highway" and "Building" wage rates.

For copies of the state's wage rates call (406) 444-5600, or write:

Labor Standards Bureau  
Montana Department of Labor and Industry  
PO Box 6518  
Helena, MT 59604

Or visit their internet site at:

<http://www.ourfactsyourfuture.org/?PAGEID=67&SUBID=143>

Under ARM 24.17.127, the wage rates applicable to a particular public works project are those in effect at the time the bid specifications are advertised. To ensure that the proper rates are being used, the TSEP grant recipient should check the MDLI website on the day that the bids are advertised.

If TERO (Tribal Employment Rights Office) requirements may be applicable to a project, then TSEP will route the proposed TERO plan through the Governor's office for review. TERO requirements have generally not been allowed on projects funded and constructed by municipalities or counties within the reservation boundaries.

In addition to the minimum legal advertising, MDOC strongly recommends that TSEP grant recipients also advertise at least once in a newspaper with regional distribution in their area of the state. The bid solicitation can also be submitted to plan exchanges and bid clearinghouses such as those administered by the Montana Contractors Association. The more exposure the bid solicitation receives, the more qualified contractors will be aware of it, hopefully resulting in lower and better bid proposals.

Any amendments to the bid package must be mailed as an addendum to each bidder, and every bidder must be given an appropriate period of time to review and respond.

### **Step 5 - Log Each Bid**

Upon receipt, each bid should be logged as to time and date of receipt. The bids should remain sealed and safely stored until the bid opening.

### **Step 6 - Conduct Bid Opening**

The bid opening should be conducted in a businesslike manner with each bid being opened and reviewed prior to reading aloud the dollar amounts. The TSEP grant recipient's attorney should participate in the bid opening. If any irregularities are found, the amounts should not be read or considered and the bid should be returned to the bidder. Should a bidder identify an error in the bids, in any form, the TSEP grant recipient's attorney should review the state statutes governing bid irregularities before proceeding. When all matters of bid irregularities are resolved, the low bidder will then be determined.

Examples of irregularities for consideration in the rejection of bids include:

- bid proposals not submitted on specified forms, or altered in form by a bidder;
- unsigned bid proposals;
- bid proposals not accompanied by the specified guarantee (bid bond, etc.);
- bid proposals by unqualified or improperly licensed entities, contrary to specifications or law;
- qualifying a bid or bid items in a bid proposal contrary to the specified requirements of bid items or bidding documents;
- bid proposals that omit items required by the specifications;
- altering a bid as to specified time of commencement or completion of work; and

- bid proposals that fail to acknowledge an addendum.

Examples of minor bid irregularities that may be waived include:

- omission of date when signed, or title of person signing;
- failure to initial erasures (assuming other information is legible);
- failure to acknowledge an addendum that does not affect quantity, quality, time or price;
- submission of a bid in an unsealed envelope;
- omission of a subcontractor's or supplier's name at bid submission time;
- unit price bid proposals that include correctable, reconcilable arithmetic errors if the unit price does not change; and
- lump sum bid proposals that include correctable, reconcilable arithmetic errors if the amount on which the award will be based does not change.

In the event that all bids exceed the amount of funds available for the construction project, the TSEP grant recipient has two options:

1. use additional local financing resources such as general revenues or bond proceeds; or
2. modify the bid package and repeat the entire bid process as outlined above.

The TSEP grant recipient cannot negotiate with the low bidder to bring the offer in line with the project budget. If a TSEP grant recipient has reason to believe that bids may come in higher than available funds, separate (deductive) bid schedules should be used. Under this approach, the bid proposal would contain several schedules of work items or components to be provided, and any one of them could then be eliminated from the project.

### **Step 7 - Review Low Bid**

Following the bid opening, the low bid should be reviewed to ensure that the bid submission is technically and legally responsive to the solicitation for bids, that the contractors and all subcontractors are qualified and have the capacity to carry out the project as scheduled. If, in the opinion of the project engineer and the TSEP grant recipient's attorney, the low bid proves to be unsatisfactory for any reason, and the TSEP grant recipient chooses to use



the next lowest bidder, a statement of justification must be sent to the low bidder with a copy retained in the construction contract file.

### **Step 8 - Verify Low Bidder Eligibility**

Prior to awarding any construction contract, the TSEP grant recipient must provide notice to the TSEP liaison of the name of the prospective contractor firm and its principal owner(s). The TSEP liaison will then check with the Montana Department of Labor and Industry (MDLI) to determine if those names are listed and provide the TSEP grant recipient with a notice of the contractor's eligibility or ineligibility. TSEP funds may be withdrawn from any contract entered into with a listed or otherwise ineligible contractor. (Contractor eligibility reviews are also discussed in Chapter 6, Labor Requirements.) TSEP will also verify that a contractor is registered with the MDLI. After debarment and registration review, no further MDOC approval of the contractor is required. If federal funds are involved in the TSEP project, the appropriate funding agencies should also be consulted regarding federal debarred contractor requirements.

### **Step 9 - Award Contract**

The TSEP grant recipient should make the contract award within 30 days of the bid opening unless there are special circumstances, such as if the funds are not yet available or if the project requires some legislative action. Generally, the bid is valid beyond sixty days only with the agreement of the low bidder. If a delay of longer than 60 days is anticipated, TSEP grant recipients should contact their TSEP liaison for guidance. (A sample "Notice of Award" is included in the "Montana Public Works Standard Specifications" cited earlier.)

The complete contract package should consist of an executed contract document that includes the following attachments:

- all items included in the bid package;
- contractor's bid proposal;
- bond and insurance forms; and
- signed contractor certifications.

### **Step 10 – Submit a Revised Project Budget and Implementation Schedule**

Once the TSEP grant recipient has determined who will be awarded the construction contract for the project, a revised project budget must be submitted to the TSEP liaison to reflect the amount of the bid. In the event that the accepted bid(s) received is less than the approved budget for the construction project, MDOC reserves the right to share

proportionately in any savings with all funding sources. Any savings will be added to the contingency portion of the project budget. Within 15 days after the construction project has been awarded, a final project budget must be established with MDOC.

If there are any savings upon completion of the project, MDOC reserves the right to share proportionately in those savings with all funding sources. However, the TSEP grant recipient may request to use the balance of the TSEP funds for an eligible activity, which further enhances the contracted project. Before MDOC makes a determination to allow the additional activity, the TSEP grant recipient must demonstrate that the activity will:

- be consistent with the intent of the original proposed project approved by the Legislature;
- be consistent with the environmental scope of the project;
- clearly enhance the overall impact of the original project; and
- be able to be completed with the excess funds in a timely manner.

The TSEP grant recipient must have also demonstrated satisfactory progress toward completion of the original contracted project activities.

The TSEP grant recipient should send the TSEP liaison a written request to amend the TSEP contract for the additional activities, including full rationale and cost details, for MDOC review and approval. If MDOC denies this request, the bid amount plus ten percent (10%) contingency will be established as the revised or final construction budget.

The TSEP grant recipient must also submit a revised project implementation schedule to the TSEP liaison within 15 days after the construction bid has been awarded. The TSEP grant recipient must incorporate into the implementation schedule each major milestone in the construction of the project. The implementation schedule should indicate the time period required to construct the major components of the project. The project engineer should be able to provide that information to you.

### **Step 11 - Hold Preconstruction Conference**

The preconstruction conference should be held soon after the contract award. The TSEP grant recipient and prime contractor should include all subcontractors in the discussions to ensure that the subcontractors are aware that they must also comply with the federal labor standards and civil rights provisions. TSEP must be notified as to the date and location of the preconstruction conference.

The conference represents a key opportunity prior to beginning project construction for the TSEP grant recipient to give instructions to the contractor. These instructions should include a review of the project and timetable, method for payment, and contractor responsibilities related to labor standards, and other state or local requirements. At this meeting, the contractor should be given a copy of the Preconstruction Conference Planning Guide Supplement, which can be found in the Exhibits section of Chapter 6. The TSEP grant administrator should ensure that minutes of the preconstruction conference are placed in the construction contract file.

### **Step 12 - Issue Notice to Proceed**

Upon execution of the contract and holding the preconstruction conference, the TSEP grant recipient may then provide the prime contractor(s) with a "Notice to Proceed." This notice establishes the construction starting date and the estimated date of completion. (A sample "Notice to Proceed" is included in the "Montana Public Works Standards Specification" cited previously.)

A copy of the notice must be sent to your TSEP liaison when issued to the contractor. Additionally, TSEP must be notified as to the firm that was awarded the construction contract.

### **Step 13 - Monitor Contractor Activities**

Throughout the construction period, the TSEP grant recipient is responsible for monitoring the contractor for performance with the project's technical specifications and for compliance with all state and local standards and the terms of the contract.

Performance monitoring should be conducted by the TSEP grant recipient's engineer and consist of the following elements:

- general supervision, including identifying the need for any construction adjustments and preparation of contract amendments. Change orders that would affect the TSEP portion of the project budget by more than \$5,000, or substantially affect the approved TSEP-funded scope of work as described in the TSEP contract with the TSEP grant recipient, require prior MDOC review and concurrence before such change orders are signed. This also involves reviews of major changes to the estimated construction schedule;
- quality control to the extent necessary to ensure compliance with technical specifications and conformance with codes and standards;
- quality control as needed to ensure that the contractor is providing materials and products consistent with the quantities identified in the design and specifications; and

- certification of pay estimates to be used by the TSEP grant recipient's financial officer to verify estimated costs for partial payments. The project engineer should also obtain evidence that the contractor has made payments to subcontractors or suppliers.

Where the construction project was awarded based on a fixed price bid, the contractor should prepare a cost breakdown showing the amount of funding associated with each element of the construction contract. This information can be used by the engineer for performance monitoring and for determining the accuracy of requests for payments. A copy of this information, which is usually incorporated into the contractor's payment request form, should be included in each of the TSEP grant recipient's draw requests to facilitate MDOC financial review requirements.

### **Retainage**

Partial payments may generally be made up to 95 percent of the total amount of compensation in the contract. The remaining five percent, or retainage amount, is held pending the final inspection and acceptance of work. The actual amounts retained may vary, depending on the amount of the contract, progress of construction, and other specific instructions in the contract. Any interest earned on retained funds is not required to be paid to the contractor.

### **Gross Receipts Tax**

In addition to the retainage, the TSEP grant recipient must retain one percent of the total amount of each partial payment due to the contractor and transmit these funds to the Montana Department of Revenue for the Contractor's Gross Receipts Tax. Information and forms regarding the gross receipts tax can be found on the Department of Revenue's website at <http://mt.gov/revenue/formsandresources/forms.asp> under the heading Miscellaneous Tax Forms.

Compliance monitoring for labor and other requirements should be conducted on an ongoing basis by the TSEP grant recipient. Refer to Chapter 6, Labor Requirements, for guidance.

## **Step 14 - Conduct Final Inspection**

Upon completion of the construction activities, the engineer must provide the TSEP grant recipient with a set of "as-built" plans with the request for final payment. The TSEP grant recipient must conduct a final inspection of the construction work. Additionally, there should be a determination of whether all state prevailing wage requirements have been satisfied, and that all contract files are complete.

The engineer will normally issue a certificate of substantial completion if they are satisfied that the terms of the construction contract have been met. Upon final completion and acceptance of the work, and in accordance with the General Conditions, the TSEP grant recipient shall pay the remainder of the contract price as recommended by the project engineer and as provided in the General Conditions.

Within 90 days after completion of construction activities, the Montana Department of Environmental Quality requires "as-built" plans to be submitted by your engineer for all water and sewer projects, along with his certification that these activities were completed in accordance with the initially approved plans and specifications. The Bridge Management Section of the Montana Department of Transportation has also requested copies of final bridge plans so that their information is up to date for future bridge inspections.

Chapter 11 of this manual contains project closeout requirements.

### **C. MAINTAIN RECORDS**

For each major construction (prime) contract the TSEP grant recipient should maintain a separate contract file. The following documents should be retained in the construction contract file:

- design and cost estimates;
- evidence of easements and acquisition;
- bid documents, including required labor and other provisions;
- evidence of bid advertising;
- minutes of bid opening including tabulation of bids;
- evidence of low bid review;
- evidence of verifying eligibility of low bidder;
- copy of Notice of Contract Award;
- executed contracted documents with attachments;
- minutes of preconstruction conference;
- copy of Notice to Proceed;

- monitoring and inspection reports;
- evidence of the final inspection;
- notice of acceptance of work;
- lien releases from all contractors and suppliers; and
- evidence of disposition of outstanding claims.

The following information should be retained in the labor standards file:

- contractor's weekly payroll and signed Statement of Compliance;
- records of construction worker interviews; and
- evidence of any violations and resolutions of violations.

## **SUMMARY**

Compliance with the applicable state requirements, such as procurement and labor standards, is the responsibility of the TSEP grant recipient and can be met by:

- Selecting engineering services in accordance with state procurement standards appropriate for competitive negotiation (Requests for Proposals) (see Step 1);
- Preparing design plans and bid specifications and all remaining bid document items which include the required state construction contract provisions and receive all necessary state and federal agency reviews and approvals (see Steps 2 and 3);
- Providing for the appropriate advertisement of bid solicitation and bid security procedures (see Steps 4 and 5);
- Conducting the bid opening in a proper manner and giving appropriate attention to bid review procedures (see Steps 6, 7, and 8);
- Awarding the construction contract to the lowest responsible bidder within the required time and submitting a revised budget and schedule to TSEP (see Steps 9 and 10);

- Holding a preconstruction conference to inform the prime contractor and all subcontractors performing contract construction work of their legal obligations (see Step 11);
- Providing the required notices when initiating construction activities (see Step 12);
- Monitoring contractor activities throughout the construction period to ensure performance is in accord with the technical specifications and compliance is maintained with all state and local requirements and the terms of the contract (see Step 13); and
- Conducting the final inspection and filing the required notices and reports with the appropriate agencies and maintain records (see Steps 14 and 15).

## **CHAPTER 8**

### **EXHIBIT**

8-A      TSEP Supplemental General Conditions